SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1359

LESTER WHEELER,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM E. WRIGHT
M. D. YAGER
Attorneys for Respondent
2141 International Trade Mart
New Orleans, Louisiana 70130

TERRIBERRY, CARROLL, YANCEY & FARRELL
Of Counsel

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MAY IT PLEASE THE COURT:

Not only is there no important or special reason for granting a writ of certiorari in this case, there is no reason whatsoever to do so.

This case involves a simple question of whether a longshoreman (petitioner herein) was injured as a result of unseaworthiness, or whether his accident occurred due to the single,isolated personal negligent

act on the part of a fellow longshoreman.

The district court, after a full trial on the merits and after hearing the witnesses in open court, decided for the respondent herein and concluded that the petitioner's remedy was limited to recovery of compensation benefits under the Longshoremen's and Harbor Workers' Act because the accident resulted solely from a fellow longshoreman's negligence and not from unseaworthiness.

On appeal, the Court of Appeals correctly pointed out that the case raised one issue: did the record support the findings, conclusions, and judgment in favor of respondent. After full briefing and consideration, the Court of Appeals affirmed the judgment of the trial court and specifically found that the findings, conclusions and judgment are all supported by the record. The opinion below has been reported officially in 431 F. 2d 570.

While petitioner's brief is somewhat difficult to follow in setting forth the questions presented and the arguments with respect to the issues, it appears to us that only two comments of petitioner require reply: (1) the contention that the Court of Appeals "determined" there was no negligence on the part of the winch operator, and (2) the suggestion that the trial court's findings of fact and conclusions of law were designed to place the case "beyond the pitfalls" of Usner v. Luckenbach Overseas Corporation, ___U.S. _____, 91 S.Ct. ____, 27 L.Ed. 2d 562 (1971).

The first point, the alleged exculpation of the winch operator by the Court of Appeals, evolves from petitioner extracting out of context a statement in the court's opinion and twisting that statement from its original meaning. A full review of the opinion will show conclusively that the Court of Appeals did not hold the winch operator was free from negligence or fault. In fact, to the contrary, the court specifically observed "there is direct evidence that the accident occurred because the longshoreman winch operator failed to raise the empty wire rope sling sufficiently high to clear the deck cargo". Accordingly, the suggestion of petitioner that the Court of Appeals concluded in its opinion that negligence was not the cause of the accident, as found by the trial court, is entirely without merit.*

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* The trial court clearly held that negligence of the longshoreman winch operator and not unseaworthiness was the cause of the accident, stating:

> "The sole proximate cause of plaintiff's injuries was the failure on the part of the longshoreman winch operator on this isolated occasion to raise the wire rope sling to a height sufficient to avoid becoming caught on the deck cargo. This failure occurred at the moment of plaintiff's injuries, did not cause or result in an unseaworthy condition, and did not call into

(continued on next page)

The idea, on the second point, that the "purpose" of the trial court's findings of fact and conclusions of law was to escape the "pitfalls" of Usner, supra, is equally unavailing to petitioner. Indeed, it is precisely this recent decision of this Court which completely supports and fully substantiates the decisions of both courts below in the instant matter. In Usner, just as in the present case, "what caused the petitioner's injuries ... was not the condition of the ship, her appurtenances, her cargo or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman".

Accordingly, the Usner decision, coupled with the findings of the trial court as affirmed by the Court of Appeals, leave no room whatsoever for the granting of a writ in the instant case. The findings and

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play a pre-existing condition of unseaworthiness. The action of the longshoreman winch operator in the use of seaworthy equipment in dislodging properly secured and seaworthy cargo did not render the vessel unseaworthy and does not give rise to liability, apart from compensation act benefits, against the defendants. Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5 CA 1967) and Neal v. Lykes Bros. Steamship Co., Inc., 306 F. 2d 313 (5 CA 1962)."

judgments of the lower courts are all fully supported by the record and by the Usner decision of this Court, and thus there exists no reason to grant a writ of certiorari and the petition should be denied.

Respectfully submitted,

WILLIAM E. WRIGHT
M. D. YAGER
Attorneys for Respondent
2141 International Trade Mart
New Orleans, Louisiana 70130

TERRIBERRY, CARROLL, YANCEY & FARRELL
Of Counsel

CERTIFICATE

I, the undersigned member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of this brief in opposition to the granting of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon attorneys for petitioner by depositing the same, properly addressed, in the United States mails, postage prepaid at New Orleans, Louisiana, this _____ day of March, 1971.

WILLIAM E. WRIGHT